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6 **UNITED STATES DISTRICT COURT**  
 7  
**NORTHERN DISTRICT OF CALIFORNIA**

8 LIEM HIEU LE, ) **CASE NO. 3:08-cv-00727-JL**  
 9 )  
 10 Plaintiff, ) **NOTICE OF MOTION AND**  
 11 ) **MOTION TO DISMISS, OR, IN**  
 12 ) **THE ALTERNATIVE, FOR MORE**  
 13 ) **DEFINITE STATEMENT**  
 14 v. )  
 15 CITY OF PITTSBURG, )  
 16 ) Date: April 23, 2008  
 17 ) Time: 9:30 a.m.  
 18 ) Location: Courtroom F, 15<sup>th</sup> Floor  
 19 ) Defendant. ) Judge: Magistrate Judge Larson  
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TO PLAINTIFF:

Please take notice that on the above date and time, or as soon thereafter as the matter may be heard in the above entitled Court, defendant will move the Court to dismiss all claims, or, in the alternative, to order a more definite statement of claims. This motion will be based upon the grounds set forth in the motion and the Memorandum of Points and Authorities attached hereto, namely that the complaint fails to allege a cause of action and in the alternative, that the complaint fails to give fair notice of the claims.

This motion will be based upon this Notice of Motion and Motion and the

pleadings and papers filed herein, as well as any other further material properly presented to the Court in this matter.

Dated: March 18, 2008

## GIBBONS & CONLEY

By: /s/ Sean C. Conley  
AUSTIN R. GIBBONS  
SEAN C. CONLEY  
Attorneys for Defendant City of Pittsburgh

## **MOTION**

## **MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiff's complaint, of less than one page in length, is beyond a model of brevity. The complaint does not allege any specific wrongful conduct, other than a summary legal conclusion that there was "discrimination, and the abuse of power, and the negligence of employees of defendant City of Pittsburgh." This allegation is so bare of legal and factual context that defendant cannot reasonably respond to the allegation, nor does the allegation state a cause of action against this defendant. Therefore, it is respectfully requested that this Court dismiss this complaint, or in the alternative, order a more definite statement of the claim.

**THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE  
A CAUSE OF ACTION AGAINST THE DEFENDANT.**

Under Federal Rules of Civil Procedure Rule 12(b)(6), the Court may dismiss an action which fails to state a claim upon which relief may be granted. Plaintiff initially fails to allege proper jurisdiction of this Court. Plaintiff alleges jurisdiction under 28 U.S.C. section 1332, diversity. First, it is not clear that the City is a

1 “citizen” for diversity purposes. *Miller v. Los Angeles* (9<sup>th</sup> Cir. 1964) 341 F.2d 964;  
 2 *Fifty Associates v. Prudential Ins. Co.* (9<sup>th</sup> Cir. 1970) 446 F.2d 1187, 1191; but see  
 3 *Moor v. Alameda* (1973) 411 U.S. 693, 716. Even assuming that the City is a  
 4 “citizen,” there is simply no diversity of citizenship. Plaintiff alleges he is a citizen  
 5 of the State of California, and that defendant City of Pittsburg is a California city.  
 6 Thus, plaintiff has affirmatively alleged the absence of diversity.

7 Furthermore, the sole named defendant is the City of Pittsburg, yet there is  
 8 no specific allegation that the City committed any particular act. A claim for  
 9 liability of a public entity for violation of civil rights, presuming that this is the  
 10 basis of plaintiff’s claim, cannot be based upon a theory of vicarious liability.  
 11 *Monell v. Dept. of Social Services* (1978) 436 U.S. 658, 691-692. A complaint  
 12 alleging a *Monell* theory of liability must specify acts by the public entity justifying  
 13 its independent liability. *Kelson v. Springfield* (9<sup>th</sup> Cir. 1985) 767 F.2d 651, 656.

14 Furthermore, no federal basis for jurisdiction is properly stated. The claim of  
 15 “abuse of power,” is not a recognized federal constitutional basis for jurisdiction in  
 16 Federal Court. The claim of “discrimination” is similarly inadequate to invoke  
 17 federal jurisdiction. Even presuming an Equal Protection claim is intended, such a  
 18 claim requires plaintiff to allege membership in a “suspect class.” See *Caswell v.*  
 19 *Calderon* (9<sup>th</sup> Cir. 2004) 363 F.3d 832, 838 “To states a claim for violation of the  
 20 Equal Protection Clause, a plaintiff must show that the defendant acted with an  
 21 intent or purpose to discriminate against him based upon his membership in a  
 22 protected class.” *Serrano v. Francis* (9<sup>th</sup> Cir. 2003) 345 F.3d 1071, 1082.

23 Plaintiff also alleges “negligence,” but this is a state law cause of action. The  
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1 complaint alleges that defendant City of Pittsburg is a public entity. Therefore,  
 2 compliance with the Government Claims Act is an element of this cause of action.  
 3 *California v. Superior Court (Bodde)* (2004) 32 Cal.4<sup>th</sup> 1234, 1243. Plaintiff must  
 4 affirmatively allege compliance to state a cause of action against a public entity.  
 5 *Karim-Pahahi v. Los Angeles Police Dept.* (9<sup>th</sup> Cir. 1988) 839 F.2d 621, 627.

6 Furthermore, plaintiff alleges damages in his prayer for the undifferentiated  
 7 sum of \$2 million. Federal Rules of Civil Procedure Rule 9(g) requires that  
 8 “[w]hen items of special damages are claimed, they shall be specifically stated.”

9 **PLAINTIFF, IN THE ALTERNATIVE, SHOULD BE REQUIRED TO  
 10 MAKE A MORE DEFINITE STATEMENT OF CLAIM**

11 Plaintiff is required to make a “simple, concise and direct” statement of the  
 12 basis for his claims. Federal Rule of Civil Procedure, Rule 8(e)(1). Legal  
 13 conclusion standing alone are insufficient to apprise the defendant of the basis for  
 14 the claim. See *Lee v. Los Angeles* (9<sup>th</sup> Cir. 2001) 250 F.3d 668, 679. It is simply not  
 15 enough to allege that a wrong has been committed and to make a demand for relief.  
 16 Federal rules require a pleading to give “fair notice” of the claim asserted and the  
 17 “grounds upon which it rests.” *Conley v. Gibson* (1957) 355 U.S. 41, 47-48.

18 In the present case, neither the factual basis nor the legal theory underlining  
 19 plaintiff’s claims can be identified. The complaint simply fails to allege sufficient  
 20 information for the defendant to reasonably respond to the complaint.

21 **CONCLUSION**

22 For the above reasons, defendant City of Pittsburg requests that this action be  
 23 dismissed for failure to state a claim upon which relief may be granted. In the  
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1 alternative, defendant requests that the Court order a more definite statement of the  
2 facts and claims of these stated by plaintiff so as to give defendant an opportunity to  
3 provide a reasonable response.

4 Dated: March 18, 2008

5 GIBBONS & CONLEY

6 By: /s/ Sean C. Conley  
7 SEAN C. CONLEY  
8 Attorneys for Defendant City of Pittsburg

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